United States v. Foster, No. 02-30148

THOMAS, Circuit Judge, dissenting:

Were this a typical "traffic stop" case, I would agree with my colleagues that reversal would be required. However, Foster was not stopped for a purported traffic violation; he was stopped because law enforcement officers reasonably suspected him of a narcotics violation. Therefore, I view the officers' actions as a justifiable Terry stop, and therefore non-custodial for Miranda purposes. Accordingly, I respectfully dissent.

There are significant analytical differences between a true Terry stop and traffic stop. Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984). Under the doctrine announced in Terry v. Ohio, 392 U.S. 1, 30 (1968), a law enforcement officer may briefly detain a person for investigatory purposes if he or she has a reasonable suspicion supported by articulable facts that criminal activity is afoot. United States v. Sokolow, 490 U.S. 1, 7 (1989). It is well-settled that a routine Terry stop is not "custody" triggering the need for Miranda warnings, even though, of course, the suspect is briefly detained and hence not actually free to leave. See United States v. Butler, 249 F.3d 1094, 1098 (9th Cir. 2001) ("The case books are full of scenarios in which a person is detained by law enforcement officers, is not free to go, but is not "in custody" for Miranda purposes."); see also

United States v. Galindo-Gallegos, 244 F.3d 728, 731 (9th Cir. 2001); United States v. Parr, 843 F.2d 1228, 1230-31 (9th Cir. 1988); United States v. Bautista, 684 F.2d 1286, 1291 (9th Cir. 1982).

Miranda warnings are not required for a "brief stop and inquiry that are reasonably related in scope to the justification for their initiation." United States v. Kim, 292 F.3d 969, 976 (9th Cir. 2002). Berkemer describes the relationship between a Terry stop and Miranda custody as follows:

> Typically, [a Terry stop] means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of Miranda.

468 U.S. at 439-40.

In short, in a prototypical Terry stop, the person detained is actually not free to leave during the initial questioning; thus, an inquiry as to whether he felt free to leave when stopped is not crucial to the analysis. The central issues are whether (1) officers had a reasonable suspicion of criminal activity supported by articulable facts and (2) whether the questioning exceeded the bounds of permissible Terry stop questioning.

Here, law enforcement officials discovered three hockey bags of marijuana lying on the side of a highway. While watching the site to apprehend those attempting to retrieve the contraband, officers observed Foster clearly engaging in behavior that engendered a reasonable suspicion that he was connected with the bags of marijuana found on the side of the road. Upon first passing the spot where the marijuana had been, Foster turned around and drove back by the spot, slowing down as he did so. He then circled around to twice more pass the spot before stopping his car on the highway to get out and survey the spot through the lense of his camera. He next drove on and circled around twice more, before getting out and heading toward the area where the marijuana bag had been found. Upon returning to his vehicle he made a U-turn to drive pass the spot once more before driving back in the opposite direction from which he had originated. Thus, the officers here had "a particularized and objective basis" for suspecting Foster of legal wrongdoing. See United States v. Arivzu, 534 U.S. 266, 273 (2002).

A detention does not become custody until "a suspect's freedom of action is curtailed to a degree associated with formal arrest." Berkemer, 468 U.S. at 440. In this case, the initial questioning lasted for no more than 10 minutes. During the initial detention, the officer asked Foster where he was from and where he was going. After learning that he was from British Columbia, the origin of the "B.C.

Bud" variety of marijuana found in the bags, and receiving evasive answers about Foster's destination, the officer told him he believed that Foster was looking for the marijuana. Given that it is was a reasonable suspicion of Foster's involvement with the marijuana that prompted the stop in the first place, this inquiry was clearly related in scope to the justification for its initiation.

The officer questioning Foster approached the vehicle alone and did not have his weapon drawn. The other law enforcement officers in the area likewise had their weapons holstered. Foster was not removed from his vehicle; nor was he handcuffed. Foster asked the interrogating officer if the officer were going to arrest him, and was told that the officer would not unless he found marijuana in his vehicle or on his person. A reasonable person would infer from this answer that he was not currently under arrest.

If Foster had been the subject of a routine traffic stop absent a reasonable law enforcement suspicion that he was involved in a criminal narcotics violation, I would agree with the majority. However, here, officers had reasonable suspicion that Foster was involved in specific criminal activity. They stopped him and asked him legitimate questions about his actions. From these facts, I conclude that this was a classic Terry situation, that the officers did not exceed the bounds of the questioning permitted by Terry, and that Miranda warnings were not required

under the circumstances.

I would affirm the conviction.